2011 WL 9191847 (N.M.) (Appellate Petition, Motion and Filing)
Supreme Court of New Mexico.

Michael Paul ASTORGA, Petitioner,

v.

The Honorable Neil CANDELARIA, District Judge, Second Judicial District, County of Bernalillo, State of New Mexico; and the State of New Mexico, by and through its Second Judicial District Attorney, Kari E. Brandenburg, real party in interest, Respondents.

No. 33, 152.
August 26, 2011.

Petitioner's Brief

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***i** TABLE OF CONTENTS

TABLE OF CONTENTS i
a) LIST OF LEGAL ISSUES ii
b) TABLE OF AUTHORITIES iv
c) CONCLUSION 19
d) PROOF OF SERVICE 22

***ii** LIST OF LEGAL ISSUES

I. DEATH IS NO LONGER A PENALTY AVAILABLE IN NEW MEXICO 1
A. The New Mexico Legislature, by statute, has directed that when a statute is reduced or repealed by an amendment, the penalty authorized under the statute, if not already imposed, must be imposed under the statute or rule as amended 2
B. New Mexico's Constitution, pursuant to Art. IV, Sec. 24 prohibits “special” laws and “local” laws. New Mexico further prohibits Bills of Attainder. Constitution of New Mexico, Art. II, Section 19 6
C. The Repeal of the Death Penalty in New Mexico sets forth an evolved standard of decency which makes it Cruel and Unusual Punishment as a violation of Due Process to impose the Death Penalty. Eighth Amendment, United States Constitution; Art. II, Sec. 13, Constitution of the State of New Mexico 9
D. The penalty of death for Michael Astorga is a disproportionate penalty 14
II. PETITIONER MICHAEL ASTORGA SHOULD BE ALLOWED TO PRESENT IN MITIGATION EVIDENCE AND ARGUMENT OF INNOCENCE, RESIDUAL DOUBT AND THE REPEAL OF THE DEATH PENALTY IN THE STATE OF NEW MEXICO 16
A. Residual doubt and evidence of innocence is always a mitigating factor which a jury must and should consider and a Defendant should not be prohibited in presenting or arguing such 16
***iii** B. The repeal of New Mexico' death penalty would constitute a disproportionate, extreme and conscience-shocking decision were death now given. The unequal treatment of Michael Astorga is violative of the United States' and New Mexico's great principle of equal treatment under the law 18

***iv** TABLE OF AUTHORITIES

CONSTITUTIONAL REFERENCES

Eighth Amendment to the United States Constitution 1, 2, 11
U.S.C.A Constitutional Amendment XIV 17
New Mexico Const. Art. II Sec 13 ..... 1, 2, 12, 13, 18, 20
New Mexico Const. Art. II Sec 18 13

New Mexico Const. Art. II Sec 19 ..... 2, 6
New Mexico Const. Art. II Sec 24 ..... 2, 7
New Mexico Const. Art. IV, Sec 24 ..... 6, 7
New Mexico Const. Art. IV, Sec 34 ..... 5, 6
FEDERAL LAW
A Helping Hand, LLC v. Baltimore County, MD D.MD.2004, 229 F. Supp. 2d 501 6
Atkins v. Virginia 122 S.Ct. 2242, 536 U.S. 304 (2002) 11, 12
Coker v. Georgia 422 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) 13
***V** *Communist Party of the U.S. v. Subversive Activities Control Board* U.S. COL. 1961, 81 Sup.Ct. 1357, 367 U.S. 1,6 L.Ed.2d 625, rehearing denied, 82 S.Ct. 20, 368 U.S. 871, 7 L.Ed.2d 72..... 7
Furman v. Georgia 925 S.Ct. 2726, 408 U.S. 238 (1972 ..... 1, 2, 9, 10, 11, 12, 13, 20
Herrera 506 U.S. 390, 113 S.Ct. 853..... 18
Laeyh v. Property Clerk of City of New York Police Depart. E.D.N.Y. 1991, 774 F.Supp. 742..... 7
Louisiana es rel. Francis v. Resweber 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed.2d 44..... 9
McGautha v. California 402 U.S. 183,91 S.Ct. 1451, 28 L.Ed. 2d 711..... 11
Robinson v. California 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758..... 9
Roper v. Simmons 125 S.Ct. 1183, 543 U.S. 551 (2005) 11, 12
Troop v. Dulles 355 U.S. 86, 78 S.Ct. 590, 2 L.Ed. 2d 630.... 12
NEW MEXICO CASE LAW
Albuquerque Metropolitan Arroyo Flood Control Authority v. Swinburne (1964), 74 N.M. 487, 394 P.2d 998..... 7
Cardenas-Alvarez 2001-NMSC-017..... 12
***vi** *Clark v. Tansey* (1994), 118 N.M. 486, 882 P.2d 527, rehearing denied 17
Davey V. McNeil (1925), 31 N.M. 7, 240 P. 482..... 7
Lucero v. New Mexico State Highway Department (1951), 55 N.M. 157, 228 P.2d 945..... 7, 8, 20
Montoya v. Ulibarri 164 P.3d 479 (2007) 12, 13, 18
Pankey v. Hot Springs Nat. Bank (1939), 44 N.M. 59, 97 P.2d 391..... 6
Right to Choose v. Johnson 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841..... 12
Starko, Inc. v. Cimarron Health Plan, Inc. (2005), 137 N.M. 310, 110 P.3d 526, cert. denied, 137 N.M. 454, 112 P.3d 1111..... 6
State v. Allen 8(1999), 128 N.M. 482, 994 P.2d 728, rehearing denied, cert. denied, 120 S.Ct. 2225, 530 U.S. 1218, 147 L.Ed. 2d 256..... 15
State v. Cheadle (1983), 101 N.M. 282, 681 P.2d 708, cert denied, 104 S.Ct. 1930, 466 U.S. 945, 80 L.Ed.2d 475..... 15
State v. Clark (1991), 128 N.M. 119, 990 P.2d 793, rehearing denied 15,17
***vii** *State v. Compton* (1986), 104 N.M. 683, 726 P.2d 837, cert. denied, 107 S.Ct. 291, 479 U.S. 890, 93 L.Ed.2d 265, denial of habeas corpus affirmed, 173 F.3d 863..... 17
State v. Flores (2004), 135 N.M. 759, 93 P.3d 1264, rehearing denied 18
State v. Garcia (1983), 99 N.M. 771, 664 P.2d 969, cert. denied., 103 S.Ct. 2464, 463 U.S. 1112, 77 L.Ed. 2d 1341 ... 13, 15, 19

State v. Guzman (1984), 100 N.M. 756, 676 P.2d 1321, cert. denied, 104 S.Ct. 3548, 467 U.S. 1256, 83 L.Ed.2d 851.....	14
State v. Henderson 109 N.M. 655, 789 P.2d 603 (1990)	17
State v. Jacobs (2000), 29 N.M. 448, 10 P.3d 127, rehearing denied	15
State v. Lucero 163 P.3d 489 (2007)	3, 4, 5
State v. Martinez 2002-NMSC-008, 132 N.M. 32, 43 P.3d 1042.....	6
State v. Nunez 200-NMSC-013, 129 N.M. 63, 2 P3d 264.....	12
State v. Pace 80 N.M. 364, 456 P.2d 197 (1969)	6
State v. Rueda 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351.....	13
***viii** *State v. Shay* 136 N.M. 8, 94 P.3d 28, Ct.App. 2004 ..	4, 5
State v. Stanford 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.....	4
State v. Truktenis (2004), 135 N.M. 223, 86 P.3d 1050.....	6
State v. Vallejos 1997-NMSC-040, 123 N.M. 739, 945 P.2d 957.....	13
State v. Roy Wyrostek (1994), 117 N.M. 514, 873 P.2d 260..	15, 19
Territory v. Baca (1992), 6 N.M. 420, 6 Gild 420, 30 P.864..	7
Thompson v. McKinley County (1991), 112 N.M. 425, 816 P.2d 494.....	7, 8
Vigil v. State (1952), 56411, 244 P.2d 1110.....	8
Woo Dak San v. State 36 N.M. 53,7 P.2d 940 (1931)	6
III. NEW MEXICO STATUTES AND/OR JURY INSTRUCTIONS	
Repeal Act, L 2009, Ch 11, Sec 5, NMSA 31-20A-2, eff. July 1, 2009	1, 3, 5
NMSA 1978 12-2A-16(C)	1, 2, 3, 4, 5, 20
***ix** NMSA 31-20A-2	10, 16, 17
NMSA 31-20A-4	14
NMSA 31-20A-5(A)	14
NMSA 31-20A-6	16, 17
UJI 14-7029	16, 17

***1 COMES NOW,** Petitioner, **MICHAEL PAUL ASTORGA,** by and through his attorneys, **GARY C. MITCHELL** and **THOMAS CLARK,** and submits the following Brief in support of his Petition to the Supreme Court:

I. DEATH IS NO LONGER A PENALTY AVAILABLE IN NEW MEXICO.

New Mexico, in 2009, evolved to a higher standard of decency, marking its progress as a more mature society by repealing the death penalty. ***Repeal Act, L 2009, Ch 11, Sec 5, N.M.S.A. 31-20A-2, eff. July 1, 2009.*** Execution of human beings by the State is now Cruel and Unusual Punishment. ***New Mexico Const. Art. II, Sec 13; Eighth Amendment to the United States Constitution; Furman v. Georgia,*** 925 S.Ct. 2726, 408 U.S. 238 (1972). The question now is do we, in an arbitrary and capricious, willful and wanton and freakish manner, use the death penalty on those convicted of aggravated first degree murder occurring before July 1, 2009? We should not for the following reasons:

1. ***N.M.S.A. 12-2A-16 (C)*** states, "If a criminal penalty for a violation of a statute or rule is reduced by an amendment, the penalty, if not already imposed, must be imposed under the statute or rule as amended." ***N.M.S.A. 1978 12-2A-16(C).***

2** 2. The New Mexico Constitution prohibits Local or Special laws, thus any portion of the Repeal Act which left the penalty of death as a sentence for a very limited and/or a single person (as in Michael Astorga's case) violates New Mexico's prohibition against a Special Laws. Bills of Attainder are also prohibited. ***New Mexico Constitution, Art. II, Sec 19 and Art. II, Sec 24.

3. ***Art. II, Sec. 13 of the New Mexico Constitution*** ***and the Eighth Amendment to the United States Constitution as interpreted by Furman v. Georgia,*** supra, provide that when a State adopts an evolved standard of decency which prohibits the death penalty, use of the death penalty would be cruel and unusual punishment.

4. The penalty of death in the case of *State v. Michael Astorga* would be a disproportionate penalty in violation of the Capital Felony Sentencing Act, and with the Repeal, disproportionate to such an extent it is arbitrary, capricious, wanton, freakish and unequal.

A. The New Mexico Legislature, by statute, has directed that when a statute is reduced or repealed by an amendment, the penalty authorized under the statute, if not already imposed, must be imposed under the statute or rule as amended.

N.M.S.A. 1978, Section 12-2A-16(C) states that if a criminal penalty for a violation of a statue or rule is reduced by an amendment, the penalty, if not already ***3** imposed, must be imposed under the statute or rule as amended. The statute in its very literal meaning dictates clearly that Michael Astorga should not be subject to the penalty of death because the penalty of death has been repealed as a penalty in the State of New Mexico. He was not convicted or sentenced prior to July 1st, 2009. The attempt by the Legislature to restrict a penalty of death to those who allegedly committed a murder with an aggravating circumstance prior to July 1st, 2009 is contrary to and in violation of ***N.M.S.A. 197812-2A-16 (C).***

The Repeal Act in and of itself failed to repeal the death penalty for the two men on death row and for anyone committing murder in the first degree with an aggravating circumstance(s) if the homicide occurred prior to July 1st, 2009 and after the reinstatement of the death penalty in 1979. ***Repeal Act,*** supra. In New Mexico, only three men are in that predicament, and one is Michael Paul Astorga. In his case, he is the only one remaining who, prior to July 1st, 2009, was death-eligible based on the aggravating circumstance of murder of a peace officer. All others similarly situated have been resolved without an execution, or the State has elected not to seek the death penalty, and no one is on death row for said aggravating circumstance.

The Supreme Court's pronouncement in ***State v. Lucero,*** 163 P.3d 489 (2007), sets forth distinguishing factors that modifies the clear meaning of ***12-2A-16(C).*** The Supreme Court has held that the law, at the time of the commission of ***4** the offense is controlling in certain instances. ***Lucero,*** supra; ***State v. Stanford,*** 2004-N.M.C.A.-071, 136 N.M. 14, 94 P.3d 14. In ***Lucero,*** supra, the Court held that an enhancement (old age) that is an element of the crime at the time of conviction dictates the time of the commission of the offense is controlling. Because the victim was **elderly** at the time of the crime, the state of the law at the time of the crime should control, the Court said in ***Lucero.*** See also: ***Stanford,*** supra.

The Supreme Court in ***Lucero*** specifically referred to ***State v. Shay,*** 136 N.M. 8, 94 P.3d 28, Ct.App. 2004, and noted that ***N.M.S.A. 12-2A-16 (C)*** would control in the instance in which the right or remedy did not ripen until after conviction. Specifically, ***Shay*** noted there was no Constitutional prohibition to applying the amendment of the habitual offender statute to cases in which a supplemental information charging habitual offender status was not filed before the effective date of the statute. In ***Shay,*** the Court found that the amendment of the habitual offender statute narrowed the definition of prior felonies, therefore it applied to all habitual offender penalty enhancements filed after the amendment despite when the crime was committed due to the applicability of ***N.M.S.A. 12-2A-16.*** The rule, after ***Lucero,*** supra, is if the amendment or remedy affects the status of the elements of the offense, the law at the time of the crime controls, but if it goes to sentencing and the penalty then ***N.M.S.A. 12-2A-16(C)*** applies. In ***5** Astorga, this means, that since a sentence of death was not an element of murder in the first degree nor was the aggravating circumstance of murder of a peace officer an element of murder in the first degree, then the State, by statute, must apply the amended penalty. ***Lucero,*** supra; ***Shay,*** supra; ***N.M.S.A. 12-2A-16(C); Repeal Act,*** supra. Additionally, it is not just the status at the time of the alleged crime that controls, but in *Astorga*, the issue of capital sentencing implicates events and circumstances existing before, during and after any commission of the crime. Mitigation evidence can exist anytime before, during and after and may in fact have little to do with the guilty verdict. In ***Lucero,*** the crimes against the **elderly** sentencing enhancement required the jury to make factual findings beyond a reasonable doubt as to the victim's age and the

defendant's intent at the time the offense was committed. In *Astorga,* a determination of death relies upon a non-element of murder in the first degree, that is whether the person killed was a peace officer, whether aggravation outweighs mitigating evidence and, if a jury so finds, whether they chose death or not. Michael Astorga, clearly, by legislative enactment no longer has a potential punishment of death.

The ***Constitution of the State of New Mexico, Art. IV, Sec. 34*** provides, "no act of the Legislature should affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." This Constitutional provision prohibiting application of any legislative act also prohibits ***6** court rules as well. ***Starko, Inc. v. Cimarron Health Plan, Inc.*** (2005), 137 N.M. 310, 110 P.3d 526, cert. denied, 137 N.M. 454, 112 P.3d 1111. Initially appearing to conflict with the dilemma in *Astorga,* in fact it does not. Michael Astorga cannot receive the death penalty after the Repeal because he had not been convicted prior to the repeal. ***State v. Truktenis*** (2004), 135 N.M. 223, 86 P.3d 1050; ***Pankey v. Hot Springs Nat. Bank*** (1939), 44 N.M. 59, 97 P.2d 391.

It should not be overlooked or understated that an act of the Legislature which further defines the Constitutional Right under the New Mexico Constitution to be free from Cruel and Unusual Punishment cannot be superseded or modified by ***Art. IV Sec. 34,*** because "death is different," the penalty is so extreme and final and there must be no doubt. *Woo Dak San v. State,* 36 N.M. 53, 7 P.2d 940 (1931); *State v Pace,* 80 N.M. 364, 456 P.2d 197 (1969); *State v. Martinez,* 2002-N.M.S.C.-008, 132 N.M. 32, 43 P.3d 1042 (noting the unique nature of the death penalty).

B. New Mexico's Constitution, pursuant to Art. IV, Sec. 24 prohibits "special" laws and "local" laws. New Mexico further prohibits Bills of Attainder. Constitution of New Mexico, Art. II, Sec. 19.

The relevant question in determining whether legislation is prohibited under the Bill of Attainder Clause is whether the legislative record evidences intent to single out and punish. *A Helping Hand, LLC. v. Baltimore County, MD,* D.MD. ***7** 2004, 229 F Supp.2d 501. The singling out of an individual for a legislatively prescribed punished constitutes a "Bill of Attainder" where the individual is called by name or described in terms of conduct, which because of the target's past conduct, operates only as a designation of the target. ***Communist Party of the U.S. v. Subversive Activities Control Board,*** U.S. COL. 1961, 81 S.Ct. 1357, 367 U.S. 1, 6 L.Ed.2d 625, rehearing denied, 82 S.Ct. 20, 368 U.S. 871, 7 L.Ed.2d 72. Classically, to be a "Bill of Attainder" a law must specifically specify affected persons, inflict punishment and fail to provide for judicial trial. *Laeyh v. Property Clerk of City of New York Police Dept.,* E.D.N.Y. 1991, 774 F.Supp.742. New Mexico has gone even further than prohibiting a Bill of Attainder; it prohibits "special" laws. *Constitution of New Mexico,* Art. IV, Sec. 24; *Thompson v. McKinley County* (1991), 112 N.M. 425, 816 P.2d 494; *Davey v. McNeil* (1925), 31 N.M. 7, 240 P. 482; *Albuquerque Metropolitan Arroyo Flood Control Authority v. Swinburne* (1964), 74 N.M. 487, 394 P.2d 998; *Lucero v. New Mexico State Highway Department* (1951), 55 N.M. 157, 228 P.2d 945; *Territory v. Baca* (1992), 6 N.M. 420, 6 Gild 420, 30 P. 864.

New Mexico Constitution, Art. IV, Sec. 24 provides in pertinent part, "The Legislature shall not pass local or special laws in any of the following cases: ... the punishment for crimes and misdemeanors; ... in every other case where general law can be made applicable no special laws shall be enacted." A law is considered ***8** a "general law" if the subject of the statute may apply to and affect people of every political subdivision of the State. *Thompson v. McKinley County,* 1991, 112 N.M. 425, 816 P.2d 494. For example, a statute granting consent by the State to be sued to recover from personal injuries by four minor plaintiffs through negligence of employees of the State penitentiary was held to be unconstitutional as a special law enacted where general law could have been made applicable. *Vigil v. State* (1952), 56411, 244 P.2d 1110. "Special laws" are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances. *Lucero v. New Mexico State Highway Dept,* supra. A "special law" is also defined as legislation written in terms which would make it applicable only to named individuals or determinative situations. ***Thompson,*** *supra.* The fact an act as serious and final as the death penalty is made to apply only to Michael Astorga and no others or at its most broad application to Michael Astorga, two men on death row and potentially less than four or five others makes it a special law in violation with the Constitution of New Mexico. Particularly egregious is the only person the death penalty would apply to for the murder of a peace officer is now Michael Astorga.

The question in this case is whether the repeal of the death penalty and its failure to repeal the death penalty for those on death row and those who are convicted of a capital felony occurring prior to July 1st, 2009 with an aggravating ***9** circumstance constitutes a Bill of Attainder or special law. First, there could be no doubt there is a very limited number, and in fact, reality dictates the sole person who will face the death penalty for the aggravating circumstance of murder of a peace officer is Michael Paul Astorga. Second, it cannot be overlooked that politicians in high offices have demanded the penalty of death for Michael Paul Astorga and he is in a position of being the only one because all other homicides of police officers have been resolved and at this time no one faces the penalty of death other than Michael Astorga and he will be the only one with the potential of having the penalty of death enforced against him.

C. The Repeal of the Death Penalty in New Mexico sets forth an evolved standard of decency which makes it Cruel and Unusual Punishment as a violation of Due Process to impose the Death Penalty. Eighth Amendment, United States Constitution; Art. II, Sec. 13, Constitution of the State of New Mexico.

The United States Supreme Court in ***Furman v. Georgia,*** supra, settled the law that the requirements of Due Process ban cruel and unusual punishments in certain instances. See also: ***Louisiana es rel. Francis v. Resweber,*** 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed.2d 442; ***Robinson v. California,*** 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758.

Furman made it clear the Eighth Amendment to the United States Constitution, applicable via the Fourteenth Amendment to the States, "must draw ***10** its meaning from the evolving standards of decency that mark the progress of a maturing society." Extremely important to Michael Paul Astorga is the United States Supreme Court's statement in ***Furman,*** supra, that it is incontestable the death penalty inflicted upon one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position or class, or if it is imposed under a procedure that gives room for the play of such prejudices. In Michael Astorga's case, the very fact the repeal of the death penalty in the State of New Mexico specifically was done in a fashion to make certain he would face the death penalty violates that very premise.

There can be no question that New Mexico's standard of decency has evolved to the point that those who commit murder will not face any longer the punishment of death. New Mexico has now evolved to such a standard that it will no longer be in the killing business but will rely upon life in prison without the possibility of parole in some very distinguishable cases and life imprisonment with the possibility of parole after 30 years in others. **N.M.S.A. 31-20A-2** (July 1st, 2009).

Furman also discusses the fact that a penalty, fine, imprisonment or the death penalty cannot be unfairly or unjustly applied. The vice in Michael Astorga's case is not just in the penalty but in the process by which it is inflicted. It is unfair, according to the United States Supreme Court, to inflict unequal ***11** penalties on equally guilty parties or on any innocent parties, regardless of what the penalty is. ***Furman,*** supra; see also: ***McGautha v. California,*** 402 U.S. 183, 91 S.Ct. 1451, 28 L.Ed.2d 711.

Furman further makes it clear the application of the death penalty must not be unequal. ***Furman*** discusses at length the fact most of those who are executed are poor, young and ignorant. The question in Michael Astorga's case is how more uneven can you get than to single out three people, and in particular one person who was not a convicted prior to the repeal of the death penalty, as persons who should be executed?

Evidence of the evolving standards of decency is exactly what the United States Supreme Court has looked to in deciding if the death penalty is cruel and unusual punishment. Justice Kennedy said, "The standard itself remains the same, but its applicability must change as the basic morays of society change," quoting ***Furman.*** ***Roper v. Simmons,*** 125 S.Ct. 1183, 543 U.S. 551 (2005); ***Atkins v. Virginia,*** 122 S.Ct. 2242, 536 U.S. 304 (2002). The ***Eighth Amendment to the United States Constitution*** has to be interpreted according to its text by considering history, tradition and precedent and with a due regard for its purpose and function in the Constitutional design. To implement this framework, the Supreme Court has established the propriety and affirmed the necessity of referring to the "evolving standards of decency that mark the progress of a maturing society" ***12** to determine which punishments are so disproportionate as to be "cruel and unusual." ***Roper,*** supra; ***Troop v. Dulles,*** 355 U.S. 86, 78 S.Ct.

590, 2 L.Ed.2d 630. Evolving standards of decency have prohibited the death penalty for children, ***Roper,*** supra, and the death penalty for mentally retarded individuals, ***Atkins v. Virginia,*** supra.

In the State of New Mexico, the consensus against the death penalty has evolved to its abolition. New Mexico has evolved and matured as a civilization to the point the death penalty has been repealed.

Furman also prohibits a penalty that is "wantonly" and "freakishly" inflicted. Arbitrary infliction is further prohibited. Arbitrary, capricious, wanton and freakish define exactly what is going on in this case before the Court at this time. How can it be more wanton and freakish and how arbitrary and capricious is it when the State seeks the death penalty after repeal against one individual, Michael Paul Astorga?

New Mexico's Constitution, particularly Art. II, Sec. 13, provides greater rights to New Mexico defendants than those provided in the federal Constitution. See: ***Montoya v. Ulibarri,*** 164 P.3d 479 (2007); State v. Nunez, 200-N.M.S.C-013, 129 N.M. 63, 2 P.3d 264; Cardenas-Alvarez, 2001-N.M.S.C.-017; ***Right to Choose v. Johnson,*** 1999-N.M.S.C.-005, 126 N.M. 788, 975 P.2d 841. The Supreme Court of New Mexico has specifically determined ***New Mexico's*** } ***Constitution at Art. II, Sec. 18,*** ensuring Due Process, and at Art. II, Sec. 13, prohibiting Cruel and Unusual Punishment, provide greater protection than their federal counterparts. ***Montoya v. Ulibarri, supra; State v. Vallejos,*** 1997-N.M.S.C.-040, 123 N.M. 739, 945 P.2d 957; ***State v. Rueda,*** 1999-N.M.C.A.-033, 126 N.M. 738, 975 P.2d 351. New Mexico will not ignore a claim of actual innocence. ***Montoya,*** supra.

13** In particular and directly applicable to the case of *State v. Michael Astorga*, is the New Mexico Supreme Court's interpretation of ***Art. II, Sec. 13 of the New Mexico Constitution. In Montoya, the Supreme Court states, "a punishment is excessive and unconstitutional if [the punishment] (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) [the punishment] is grossly out of proportion to the severity of the crime." ***State v. Garcia,*** 99 N.M. 771, 664 P.2d 969 (1983) (quoting ***Coker v. Georgia,*** 422 U.S. 584, 97 S.Ct. 2861, 53 L Ed.2d 982 (1977)).

Art. II, Sec. 13 of the New Mexico Constitution prohibiting Cruel and Unusual Punishment taken in conjunction with the United States Supreme Court's decision in ***Furman*** and New Mexico's greater protections of Due Process should make it extremely clear the death penalty in New Mexico, having been repealed for ***14** everyone but a very few select individual(s) whose only difference is a date in time, can no longer be a punishment for these few selected individuals.

D. The penalty of death for Michael Astorga is a disproportionate penalty.

The seeking of the death penalty for Michael Astorga is disproportionate in violation of the United States and New Mexico Constitutions in that no person has been executed for the aggravating circumstance of murder of a peace officer or is on death row awaiting execution during the period of time the death penalty was in effect in New Mexico, (1979 and 2009). The Capital Felony Sentencing Act prior to its repeal included the aggravating circumstance of murder of a peace officer who was acting in the lawful discharge of an official duty when he was murdered. ***N.M.S.A. 31-20A-5(A).*** New Mexico's Capital Felony Sentencing Act provided in ***N.M.S.A. 31-20A-4*** for a review of the judgment and sentence and requires the Supreme Court of the State of New Mexico to determine if a sentence of death is imposed under the influence of passion, prejudice or any other arbitrary factors where the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. The New Mexico Supreme Court has discussed in numerous cases how this proportionality review will be conducted. ***State v. Guzman*** (1984), 100 N.M. 756, 676 P.2d 1321, cert. ***15** denied, 104 S.Ct. 3548, 467 U.S. 1256, 83 L.Ed.2d 851; ***State v. Cheadle*** (1983), 101 N.M. 282, 681 P.2d 708, cert. denied, 104 S.Ct. 1930, 466 U.S. 945, 80 L.Ed.2d 475; ***State v. Jacobs*** (2000), 29 N.M. 448, 10 P.3d 127, rehearing denied; ***State v. Roy Wyrostek*** (1994), 117 N.M. 514, 873 P.2d 260; ***State v. Allen*** (1999), 128 N.M. 482, 994 P.2d 728, rehearing denied, cert. denied, 120 S.Ct. 2225, 530 U.S. 1218, 147 L.Ed.2d 256; ***State v. Clark*** (1991), 128 N.M. 119, 990 P.2d 793, rehearing denied; ***State v. Garcia*** (1983), 99 N.M. 771, 664 P.2d 969, cert. denied, 103 S.Ct. 2464, 463 U.S. 1112, 77 L.Ed.2d 1341. ***Garcia,*** supra, sets forth the standard the Supreme Court will utilize when it states the Supreme Court will review the issue only if it is raised on appeal, will consider only New Mexico cases

which involve a defendant convicted of capital murder under the same aggravating circumstance, will consider only those cases in which the defendant received either the death penalty or life imprisonment and the conviction and sentence had been upheld by the Supreme Court, and the Supreme Court will review the record and compare the facts of the offense and all other evidence presented by way of aggravation or mitigation to determine whether the sentence is excessive or disproportionate. The reality is, no one, since the death penalty was reinstated in New Mexico in 1979, was executed for the aggravating circumstance of murder of a peace officer. Every defendant convicted of murder of a peace officer no longer faces a penalty of death. Neither Alan nor Fry is on death row for the murder of a ***16** peace officer. In short, Michael Paul Astorga, if he were to receive the death penalty, would be the sole person. The Supreme Court, without further ado, has the facts before it and can at this time declare that if Michael Paul Astorga were to receive the death penalty he would be the sole person. It defies reason, common sense and logic to believe in any way that a sentence of death for Michael Paul Astorga would be proportionate to all others similarly situated. It would not and it is blatantly disproportionate.

II. PETITIONER MICHAEL ASTORGA SHOULD BE ALLOWED TO PRESENT IN MITIGATION, EVIDENCE AND ARGUMENT OF INNOCENCE, RESIDUAL DOUBT AND THE REPEAL OF THE DEATH PENALTY IN THE STATE OF NEW MEXICO.

A. Residual doubt and evidence of innocence is always a mitigating factor which a jury must and should consider and a Defendant should not be prohibited in presenting or arguing such.

Mitigating circumstances have, since the implementation of the Capital Felony Sentencing Act, been defined as any conduct, circumstance or thing which would lead a juror individually or as a group to decide not to impose the death penalty. ***UJI 14-7029.*** By statute, ***N.M.S.A. 31-20A-2 & 6,*** mitigating circumstances are set forth in consideration of the defendant and the crime. Specific mitigating circumstances are identified in ***N.M.S.A. 31-20A-6.*** Further, anything else which would lead a juror to believe the death penalty should not be ***17** imposed is allowed. ***UJI 14-7029; N.M.S.A. 31-20A-2 & 6,*** 1978 Comp.; ***Clark v. Tansey*** (1994), 118 N.M. 486, 882 P.2d 527, rehearing denied; ***State v. Henderson,*** 109 N.M. 655, 789 P.2d 603 (1990); ***State v. Clark,*** 128 N.M. 119, 990 P.2d 793. A jury does not have to agree on the presence of a mitigating circumstance before considering it. ***S.C.R.A. 1986, Criminal UJI 14-7029; U.S.C.A. Constitutional Amendment XIV; Clark v. Tansey,*** supra. An instruction which gives a jury broad discretion to consider any factor in mitigation of a death penalty, in addition to any statutory mitigating circumstances constitutes an ample and expectable substitution for a specific list of non-statutory mitigating circumstances to be submitted by a defendant. ***State v. Compton*** (1986), 104 N.M. 683, 726 P.2d 837, cert. denied, 107 S.Ct. 291, 479 U.S. 890, 93 L.Ed.2d 265, denial of habeas corpus affirmed, 173 F.3d 863. Due Process entitles a defendant convicted of kidnapping and first murder to disclose to the jury the minimum length of his incarceration without parole if he was not sentenced to death prior to a jury's capital sentencing deliberations. ***S.C.R.A. 1986, Criminal UJI 14-7029; Clark v. Tansey,*** supra. There is no longer a question that mental retardation is a major mitigating factor and if asserted a jury must unanimously specify it does not find mental retardation before proceeding to its consideration of aggravating and other mitigating factors. Where the jury does not make the required finding or the jury is unable to reach a unanimous verdict, the Court shall sentence the defendant ***18** to life imprisonment. ***State v. Flores*** (2004), 135 N.M. 759, 93 P.3d 1264, rehearing denied.

Specifically, the New Mexico Supreme Court has clearly indicated in *Montoya v. Ulibarri*, supra, that ignoring a claim of actual innocence is fundamentally unfair. New Mexico has construed ***Art. II, Sec. 13*** which prohibits Cruel and Unusual Punishment as providing greater protection than its federal counterpart. In reaching that decision, the Supreme Court of the State of New Mexico quotes from Justice Blackmon in *Herrera,* 506 U.S. 390, 113 S.Ct. 853, the following language: “[N]othing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent.” No doubt, a habeas petitioner is permitted to assert a claim of actual innocence in his habeas petition. *Montoya,* supra.

Never in the history of the Capital Felony Sentencing Act has a district judge placed restrictions on the ability of a defendant to present evidence and argue innocence and or residual doubt. It would be fundamentally unfair and contrary to that very

language espoused by the Court in ***Montoya*** and in its long-accepted jury instruction that a jury may consider anything which would lead them individually or as a jury to decide not to impose the death penalty.

***19 B. The repeal of New Mexico's death penalty would constitute a disproportionate, extreme and conscience-shocking decision were death now given. The unequal treatment of Michael Astorga is violative of the United States' and New Mexico's great principle of equal treatment under the law.**

If jurors as a whole or individually believe it is fundamentally unfair to treat one individual different from all others similarly situated then that is a factor which should lead a juror to decide not to impose the death penalty and constitutes a major mitigating circumstance.

The Supreme Court in ***Garcia,*** supra, and ***Wyrostek,*** supra, have indicated the Supreme Court would be the only entity to consider proportionality, and while that may be true, the evidence of the repeal goes to far more than just proportionality under the Capital Felony Sentencing Act. It goes to the perverse and unequal treatment of one man whom the State seeks to execute for the murder of a peace officer. It goes to unequal, wanton, arbitrary and capricious treatment. The idea that a New Mexican would tolerate such unequal treatment is abhorrent to most people's views of the average New Mexican.

CONCLUSION

New Mexico, with its ancient civilizations, its diverse cultures and its enlightened people has been and continues to be a unique State. Long before the ***20** Legislature repealed the death penalty, the people of the State were not inclined to give it at all. According to their verdicts, New Mexicans believe it to be Cruel and Unusual Punishment. Ratified by the Legislature as no longer an acceptable penalty in 2009, it is now officially Cruel and Unusual Punishment for the State to kill a human being. The question of what to do with the two men on death row and Petitioner Michael Astorga should be readily apparent. The execution of any one of them violates ***Art. II, Sec 13 of the New Mexico Constitution*** prohibiting Cruel and Unusual Punishment. The death penalty as a punishment for Michael Astorga violates the Legislature's own enactment which provides that once a remedy is amended it is the amended remedy that serves as the available punishment. Although the Supreme Court has modified that by a decision in ***Lucero,*** that modification does not apply to Michael Astorga.

A sentence of death for Michael Paul Astorga would violate ***N.M.S.A. 12-2A-16(C),*** violate Due Process, constitute Cruel and Unusual Punishment, constitute a “Special Law” and be disproportionate and unequal. The statute read literally does apply. New Mexico has long prohibited Special Laws and Bills of Attainder which would target one individual or a very limited number of individuals. Clearly, the great scheme of the Capital Felony Sentencing Act in line with decisions of the United States Supreme Court, particularly ***Furman,*** supra, ***21** and its progeny, dictate the death penalty cannot be utilized in such an arbitrary, capricious, willful, wanton and freakish manner.

The Capital Felony Sentencing Act set forth one great final block to the utilization of the death penalty, that is, review by the Supreme Court. It is impossible to imagine a circumstance more disproportionate than that now exists in the case of Michael Paul Astorga. The Supreme Court has all the facts before it and to wait until there is an appeal to declare the death penalty is not a punishment available any longer to the State of New Mexico for Michael Astorga is at the least illogical. The long ordeal, nightmare and tragedy of the death penalty in this State needs to be finally ended by the Supreme Court of the State of New Mexico.

At the very least, should the death penalty not be ended, Michael Astorga should be given the same opportunity as every defendant fighting for his life since 1979 has had; that is, the opportunity to present to the jury evidence and argument of facts of his innocence and residual doubt. Although proportionality has been declared to be an issue solely within the discretion of the Supreme Court of the State of New Mexico, with the Repeal of the Capital Felony Sentencing Act, New Mexicans sitting on the jury should be allowed to correct what their Legislature failed to correct. They should be allowed to consider not tolerating

the wanton, willful, arbitrary, capricious and freakish idea that, in a civilized, mature society ***22** wherein death is no longer available as a penalty for a crime, the State, in one last convulsion of a draconian act, attempts to execute a human being.

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